PT Fabrik Kertas Tjiwi Kimia TBK v Kerajaan Malaysia

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–82 OF 2002
FAIZA TAMBY CHIK J
24 MARCH 2003

Civil Procedure — Certiorari — Application for order of — Respondent imposed anti-dumping duties — Adjustments to the normal value and the export price based on another related company — Whether respondent erred in law in using a third party profit on profitable sales — Countervailing and Anti-Dumping Duties Act 1993, s 16(5)

Statutory Interpretation — Aids to construction — Foreign cases — Single economic entity — Whether court should take into consideration interpretation by other international courts and panels on the use of single economic entity principle — Whether clear words of Malaysian legislation was disregarded

The applicant applied for a judicial review for an order of certiorari to quash the decision of the respondent in imposing anti-dumping duties on self-copy paper imported from the applicant into Malaysia under the Countervailing and Anti-Dumping Duties Act 1993 ('Act'). The applicant is an Indonesian company that manufactures, amongst others, self-copy paper that is exported to, amongst others, Malaysia. On 3 October 2001, Gamuda Paper Industries Sdn Bhd filed a petition in accordance with s 20 of the Act for an anti-dumping measure on imports of self-copy paper from the applicant. The initiation of the investigation was announced via a notice published in the Government Gazette No PU (B) 501 dated 25 October 2002. In October 2001, the respondent initiated investigation on the alleged dumping of self-copy paper imported from the applicant into Malaysia. On 20 June 2002 the respondent made a final determination under the Act that the export price was less than the normal value of the self-copy paper imported from the applicant into Malaysia and imposed anti-dumping duties accordingly. The applicant, being dissatisfied and aggrieved by the decision of the respondent to impose the said anti-dumping duties, commenced these judicial review proceedings pursuant to s 34A of the Act. It is not disputed that the respondent made adjustments to the normal value and the export price as follows: (i) a sum of 5.38% was added to the normal value as profits; and (ii) a sum of 0.61 % was deducted from the export price. The profit that was added to the normal value was the profit on profitable sales of one PT Mega Kertas Pratama ('Mega Kertas'), a company related to the applicant. The respondent sought to justify this on the ground that the applicant and Mega Kertas function as a single economic entity. The respondent submitted that in interpreting the words 'exporter or producer under investigation' in s 16(5) of the Act, the court must take into consideration interpretation by other international courts and panels on the use of single economic entity principle.

Held:

(1) The use of profit on profitable sales of Mega Kertas was contrary to s 16(5) of the Act. The exporter or producer under investigation here was the applicant and not Mega Kertas. The respondent therefore erred in law when it used the profit on profitable sales of Mega Kertas to determine the amount of profit to be included in the normal value. The respondent was only permitted to use the profits of the applicant pursuant to the clear words of s 16(5) of the Act. If the respondent had used the profits of the applicant to determine the amount of profit, it was not disputed that no profits had been included in the normal value as the applicant's sales were at a loss during the period of investigation. On this ground alone, it was apparent that the respondent had erred in law by not adhering to the clear provisions of s 16(5) of the Act (see paras 4–5).

(2) Even if it can be said that the use of profits of a party who is not the exporter/producer under investigation is permitted under the Act, the respondent also erred in selectively choosing to use only the profitable sales of Mega Kertas. It was not disputed that Mega Kertas' profitable sales made up only 13.62% of its total sales. It was noted that the vast majority of Mega Kertas' sales (86.38%) that were unprofitable were totally ignored by the respondent. If the respondent had taken into account the unprofitable sales of Mega Kertas' as well, the overall sales of Mega Kertas would show a net loss of approximately 13.6% and not a profit of 5.38% as determined by the respondent (see para 6).

(3) It ought to be noted that the concept of a single economic entity is nowhere provided for in the Act. It appeared to be a concept that the respondent 'imported' from the European cases cited by the respondent. The respondent had misdirected itself by applying this concept. The words of the Act are clear and unambiguous. Section 15(1) provides that no anti-dumping duty shall be imposed except in accordance with the Act. In relying on the European cases that applied the concept of a single economic entity, the respondent disregarded the clear words of our Malaysian legislation (see paras 12–13).

(4) It is misconceived for the respondent to rely s 2(5) of the Act to justify its use of the concept of a single economic entity. Section 2(5) has nothing to do with the concept of a single economic entity. It merely sets out when parties are deemed to be related for the purposes of the Act. Section 2(5) would only be relevant if a particular section of the Act refers to related parties, such as in s 17(2) of the Act. Section 16(5) of the Act is not expressed to extend to and does not make any reference to related parties. Section 16(5) is expressly restricted and confined to only the exporter or producer under investigation. Section 16(5) clearly does not permit the use of the profits of a third party, whether related or not, in substitution of the producer/exporter under investigation (see para 13).

[Bahasa Malaysia summary

Pemohon memohon satu kajian semula kehakiman untuk satu perintah certiorari untuk membatalkan keputusan responden dalam mengenakan duti anti-lambakan ke atas kertas salinan sendiri yang diimport daripada pemohon ke Malaysia di bawah

Akta Duti Timbal Balas dan Anti-Lambakan 1993 Akta ('Akta'). Pemohon adalah sebuah syarikat Indonesia yang mengeluarkan, antara yang lain, kertas salinan sendiri yang dieksport, antara yang lainnya ke Malaysia. Pada 3 Oktober 2001, Gamuda Paper Industries Sdn Bhd memfailkan satu petisyen menurut s 20 Akta tersebut untuk langkah-langkah 'anti dumping' ke atas pengimportan kertas salinan sendiri daripada pemohon. Permulaan penyiasatan dimaklumkan melalui satu notis yang diterbitkan di Gazet Kerajaan No PU (B) 501 bertarikh 25 Oktober 2002. Pada Oktober 2001, responden memulakan penyiasatan atas aktiviti lambakan kertas salinan sendiri yang diimport daripada pemohon ke Malaysia. Pada 20 Jun 2002 responden membuat penetapan muktamad di bawah Akta tersebut bahawa harga eksport adalah kurang daripada nilai biasa kertas salinan sendiri yang diimport daripada pemohon ke Malaysia dan mengenakan duti anti-lambakan. Pemohon, tidak berpuas hati dan terkilan dengan keputusan responden mengenakan duti anti-lambakan tersebut, memulakan prosiding kajian semula kehakiman menurut s 34A Akta tersebut. Adalah tidak dipertikaikan bahawa responden membuat penyesuaian kepada nilai biasa dan harga eksport seperti berikut: (i) jumlah 5.38% ditambah kepada nilai biasa sebagai keuntungan; dan (ii) jumlah 0.61% ditolak daripada harga eksport. Keuntungan yang ditambah kepada nilai biasa adalah melalui jualan keuntungan daripada satu PT Mega Kertas Pratama ('Mega Kertas'), sebuah syarikat yang berkaitan dengan pemohon. Responden memohon untuk mempertimbangkan perkara ini atas alasan bahawa pemohon dan Mega Kertas berfungsi sebagai satu entity ekonomi. Responden menghujahkan bahawa dalam tafsiran perkataan-perkataan 'pengimport atau pengeluar di bawah penyiasatan' di s 16(5) Akta tersebut, mahkamah harus mengambil kira tafsiran daripada mahkamah-mahkamah antarabangsa yang lain dan panel-panel atas penggunaan prinsip satu entiti ekonomi.

Diputuskan:

(1) (1) Penggunaan keuntungan atas jualan keuntungan Mega Kertas adalah bertentangan dengan s 16(5) Akta tersebut. Pengimport atau pengeluar di bawah penyiasatan di sini adalah pemohon dan bukannya Mega Kertas. Responden dengan itu tersilap di segi undang-undang apabila ia menggunakan keuntungan atas jualan keuntungan Mega Kertas untuk memastikan amaun keuntungan yang harus dimasukkan kepada nilai biasa. Responden hanya dibenarkan menggunakan keuntungan-keuntungan pemohon menurut perkataan-perkataan yang jelas di s 16(5) Akta tersebut. Sekiranya responden menggunakan keuntungan-keuntungan pemohon untuk memastikan amaun keuntungan, ia tidak dipertikaikan bahawa tiada keuntungan-keuntungan yang akan dimasukkan kepada nilai biasa oleh kerana jualan pemohon merugikan pada tempoh masa penyiasatan tersebut. Atas alasan ini sahaja, ia adalah jelas bahawa responden tersilap di segi undang-undang dengan tidak mematuhi peruntukan-peruntukan yang jelas di s 16(5) Akta tersebut (lihat perenggan 4–5).

(2) Walaupun ia boleh dikatakan bahawa penggunaan keuntungan-keuntungan sesuatu pihak yang bukan pengeksport/pengeluar di bawah penyiasatan dibenarkan di bawah Akta tersebut, responden juga tersilap dalam memilih untuk menggunakan hanya jualan keuntungan Mega Kertas. Ia tidak

dipertikaikan bahawa jualan keuntungan Mega Kertas adalah hanya 13.62% daripada keseluruhan jualannya. Ia harus diperhatikan bahawa kebanyakan jualan Mega Kertas (86.38%) yang tidak menguntungkan langsung tidak dihiraukan oleh responden. Sekiranya responden mengambil kira jualan yang tidak membawa keuntungan Mega Kertas juga, jualan keseluruhan Mega Kertas akan menunjukkan kehilangan bersih lebih kurang - 13.6% dan bukannya keuntungan 5.38% seperti yang diputuskan oleh responden (lihat perenggan 6).

(3) Ia patut diperhatikan bahawa konsep satu entiti ekonomik adalah tidak diperuntukkan di mana-mana di Akta tersebut. Ia nampaknya satu konsep yang responden import daripada kes-kes Eropah yang dirujuk oleh responden. Responden telah salah arahkan dirinya dengan menggunakan konsep ini. Perkataan-perkataan Akta tersebut adalah terang dan jelas. Seksyen 15(1) memperuntukkan bahawa tiada duti anti-lambakan harus dikenakan kecuali mengikut Akta tersebut. Dengan bergantung ke atas kes-kes Eropah yang memakai konsep satu entiti ekonomi, responden telah tidak menghiraukan perkataan-perkataan jelas undang-undang Malaysia (lihat perenggan 12–13).

(4) Responden telah salah faham dalam bergantung atas s 2(5) Akta tersebut untuk menjustifikasikan penggunaan konsep satu entiti ekonomi. Seksyen 2(5) tidak ada kena mengena dengan konsep satu entiti ekonomi. Ia hanya memperkatakan bila pihak-pihak dianggap sebagai berkaitan bagi tujuan Akta tersebut. Seksyen 2(5) hanya akan menjadi relevan sekiranya sesuatu seksyen di Akta tersebut merujuk kepada pihak-pihak yang berkaitan, seperti di s 17(2) Akta tersebut. Seksyen 16(5) Akta tersebut tidak meliputi dan tidak membuat sebarang rujukan kepada pihak-pihak berkaitan. Seksyen 16(5) secara nyata menghadkan dan terbatas kepada hanya pengeksport atau pengeluar di bawah penyiasatan. Seksyen 16(5) dengan jelas tidak membenarkan penggunaan keuntungan-keuntungan daripada pihak ketiga, sama ada berkaitan atau tidak, sebagai menggantikan pengeksport/pengeluar di bawah penyiasatan (lihat perenggan 13).]

Notes

For a case on certiorari, application for order of, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1490.

For cases on aids to construction generally, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1618–1981.

Cases referred to

Sarawak Shell Bhd & Anor v Menteri Kewangan [2001] 1 MLJ 602 (refd)

Legislation referred to

Countervailing and Anti-Dumping Duties Act 1993 ss 2(5), 15(1), 16, 17, 20, 22A(4), 34A, 40

Lambert Rasaratnam (Sean Yeow with him)(Lee Hishamuddin) for the applicant.
Norzita bte Abu Samah (Jabatan Peguam Negara) for the respondent.

Faiza Tamby Chik J:

[1] Enclosure (10) is the applicant's judicial review application for an order of certiorari to quash the decision of the respondent in imposing anti-dumping duties on self-copy paper imported from the applicant into Malaysia under the Countervailing and Anti-Dumping Duties Act 1993 ('the Act'). The applicant was on 29 July 2002 granted leave to make this application for judicial review. The facts of the case are as follows: The applicant is an Indonesian company. The applicant manufactures, amongst others, self-copy paper that is exported to, amongst others, Malaysia. Self-copy paper is used for transferring images from one to another underneath through writing or printing pressure without the need for carbon paper. It is used for multi-copy forms such as credit cards receipts and bank-in-slips. On 3 October 2001, Gamuda Paper Industries Sdn Bhd filed a petition in accordance with s 20 of the Act for an anti dumping measure on imports of self-copy paper in rolls and sheets ('SCP') from the applicant. The initiation of the investigation was announced via a notice published in the Government Gazette No PU(B) 501 dated 25 October 2002. In accordance with the procedures established for anti-dumping investigation, ie the agreement on implementation of article VI of the general agreement on tariff and trade 1994 ('WTO Anti-Dumping Agreement') and the Act, the respondent commenced investigation and notified interested parties including the present applicant and sent them relevant questionnaires with copies of non-confidential version of the petition for their responses. At the applicant's request for an extension to submit the questionnaire response, the respondent had obliged by granting the extension. The applicant made written request to submit their replies twice. The first extension was granted until 11 December 2001 and second extension granted for submission on 19 December 2001. The investigation period was established. Dumping margin determination covers 1 October 2000 to 30 September 2001 and the injury determination covers the period 1 October 1998 to 30 September 2001. Preliminary investigation was conducted and the notice of affirmative preliminary determination (PU(B) 57/2002) was published on 21 February 2002 in the Government Gazette together with the Customs (Provisional Anti-Dumping Duties) Order 2002 (PU(A) 74/2002). Pursuant to art 6.7 WTO Anti-Dumping Agreement and s 40 of the Act, on site verification visits were carried out to verify and seek further clarification on information that have been submitted by the applicant and also to allow submission of new information. On 24 May 2002, the notification of essential facts, which formed the basis of the decision of the final determination was circulated to all interested parties to defend their interest. The final examination of all information made available to the respondent reconfirmed the existence of dumping by the applicant. The weighted average dumping margin expressed as a percentage of export prices at GIF value is 5.53%. the respondent also recognised the existence of material injury through the effects of price undercutting, price suppression, price depression, reduced sales and market share, losses, reduced capacity utilized, increased inventory, reduced production and negative effect on return on investment. Pursuant art 3.5 of WTO Anti Dumping Agreement and s 22A(4) of the Act, the respondent also examined other factors that could have been a cause to the injury and were satisfied that other factors were not a cause to the injuries suffered by the domestic industry and thus

established the causal link between the dumping and the injury. The applicant was not satisfied with the determination and has made application for an order of certiorari to quash the decision to impose anti-dumping duties on imports of self-copy paper from the applicant.

[2] In October 2001, the respondent initiated investigation on the alleged dumping of self-copy paper imported from the applicant into Malaysia. On 20 June 2002 the respondent made a final determination under the Act that the export price was less than the normal value of the self-copy paper imported from the applicant into Malaysia and imposed anti-dumping duties accordingly. The applicant, being dissatisfied and aggrieved by the decision of the respondent to impose the said anti-dumping duties, commenced these judicial review proceedings pursuant to s 34A of the Act.

[3] It is not disputed that the respondent made adjustments to the normal value and the export price as follows:

(a) a sum of 5.38% was added to the normal value as profits; and

(b) a sum of 0.61 % was deducted from the export price.

[4] These adjustments to the normal value and export price resulted in the export price being less than the normal value, thereby leading to the conclusion that there was dumping. It is also not disputed that if these adjustments were not made by the respondent, no dumping would have been established. I am of the view that these adjustments to the normal value and export price are wrongful and not authorised by the clear provisions of the Act. The profit that was added to the normal value was the profit on profitable sales of one PT Mega Kertas Pratama ('Mega Kertas'), a company related to the Applicant. The use of profit on profitable sales of Mega Kertas is contrary to s 16(5) of the Act, and it is unreasonable in all the circumstances for the respondent to only take into account the profits on profitable sales of Mega Kertas where the vast majority and overall sales of Mega Kertas were at a loss. Section 16(5) of the Act only provides for the amount of profits by the exporter or producer under investigation to be taken into account to arrive at the constructed normal value. Section 16(5) provides:

> (5) For the purpose of this section, the amount for selling, administrative and other general expenses and for profits shall be based on actual information pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

[5] The exporter or producer under investigation here is the applicant and not Mega Kertas. The respondent therefore erred in law when it used the profit on profitable sales of Mega Kertas to determine the amount of profit to be included in the normal value. The respondent is only permitted to use the profits of the applicant pursuant to the clear words of s 16(5) of the Act. I think if the respondent had used the profits of the applicant to determine the amount of profit, it is not disputed that no profits would have been included in the normal value as the applicant's sales were at a loss during the period of investigation (encl 3, exhs TK–4 & TK–5). On this

ground alone, it is apparent that the respondent has erred in law by not adhering to the clear provisions of s 16(5) of the Act.

[6] Even if it can be said that the use of profits of a party who is not the exporter/producer under investigation is permitted under the Act, the respondent also erred in selectively choosing to use only the profitable sales of Mega Kertas. It is not disputed that Mega Kertas' profitable sales made up only 13.62% of its total sales (encl 3, para 15). It is noted that the vast majority of Mega Kertas' sales (86.38%) that were unprofitable were totally ignored by the respondent. If the respondent had taken into account the unprofitable sales of Mega Kertas' as well, the overall sales of Mega Kertas would show a net loss of approximately — 13.6% and not a profit of 5.38% as determined by the respondent (encl 3, para 16(a)). Therefore it is unreasonable in all the circumstances for the respondent to impute a profit where the overall total sales of Mega Kertas were at a loss. Again the respondent erred in law in deducting a sum of 0.61% from the export price. The amount to be deducted from the export price was determined by the respondent based on expenses incurred by one Asia Pulp & Paper (M) Sdn Bhd ('APPM') for services rendered by APPM to the applicant. There is no basis for these expenses that were incurred by APPM to have been deducted from the export price. Expenses incurred by APPM has no effect on export price. The applicant does not incur these expenses. Neither does the applicant reimburse APPM for these expenses that are incurred by APPM. APPM has confirmed this by an affidavit filed herein ie, affidavit of Djohan Gunawan affirmed on 11 July 2002. These expenses therefore have no effect whatsoever on the export price of self-copy paper by the applicant to Malaysia. The export price should not therefore have been adjusted to take into account these expenses.

[7] Section 17(1) of the Act provides that the export price applicable shall be the price actually paid or payable for the subject merchandise. Section 17(1) provides:

> 17(1) The export price shall be the price actually paid or payable for the subject merchandise.

Section 17(2) of the Act provides three exceptions to s 17(1):

(a) where there is no export price;

(b) where the export price is unreliable because the exporter and importer or third party are related; and

(c) where there is a compensatory arrangement between the exporter and importer or a third party.

Section 17(2) provides:

> (2) In cases where there is no export price or where it appears that the export price is unreliable because the exporter and the importer or a third party are related, or that there is compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the subject merchandise is first resold to an independent buyer, of if the subject merchandise is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis.

[8] There is no dispute that there is an export price here. The first exception therefore does not apply. There is also no dispute that the export price is unreliable. The export price was the export price to unrelated third parties in Malaysia. There is thus no question of any unreliability in the export price and thus the second exception also does not apply. As for the third exception, there is no compensatory arrangement between the applicant and APPM. The third exception also therefore does not apply. As the exceptions provided for in the act do not apply here, the export price actually paid or payable has to be used following the clear words of s 17(1) of the Act. There is thus no basis under the Act for the respondent to make any adjustments to the export price actually paid or payable, as was done here.

[9] The respondent addressed the following issues in its submission:

(a) The scope of judicial review;

(b) The use of profitable sales of Mega Kertas who is not the producer/exporter under investigation in the determination of normal value;

(c) The inclusion of profits in the determination of the normal value;

(d) The deduction of 0.61 % from the export price; and

(e) The jurisdiction of this court to grant a stay.

[10] It is hackneyed that the scope of judicial review is limited to a review of the decision-making process and not the decision itself. I think in the instant application the applicant is indeed seeking to review the decision-making process of the respondent in deciding that anti-dumping duties ought to be imposed. In coming to this decision, the respondent had to determine the normal value and the export price. Dumping would only be established if the export price is less than the normal value. Dumping is defined by the Act to mean 'the importation of merchandise into Malaysia at less than its normal value as sold in the domestic market of the exporting country'.

[11] The decision-making process of the respondent in determining the normal value and export price is properly the subject of the judicial review proceedings here. It is observed here that the respondent admits that the profitable sales of a third party, Mega Kertas was used to construct the normal value pursuant to s 16(5) of the Act notwithstanding that Mega Kertas is not the producer/exporter under investigation. The respondent however seeks to justify this on the grounds that the applicant and Mega Kertas function as a single economic entity. The respondent submitted that the words in s 16(5) of the Act '... by the exporter or producer under investigation' must be read together with s 2(5) of the Act. In interpreting the words exporter or producer under investigation, it is submitted that the court must take into consideration interpretation by other International Courts and Panels on the use of single economic entity principle. These words 'exporters'/producer' in the Act are the same words stated in art 2.2.2 of the WTO Anti-Dumping Agreement and Members in the World Trade Organisation also use the same words in their domestic legislations. Based on the peculiarity of the case the extension of the interpretation of the principle of single economic entity has been used by other investigating authorities. There is no known case law where such interpretation or use of the single

economic entity principle by the investigating authorities has been rejected by any International Court or Panel in other countries. It is submitted that if we apply more stringent interpretation than the other WTO Members, Malaysia stands to lose flexibility on the use of single economic entity principle compared to others. There will be no benefit at all to Malaysia as a nation if we do not apply the single economic entity principle when the peculiarity of the case warrants such a consideration. Moreover, other countries with the flexibility to use such interpretation have the liberty to use it against Malaysian companies. The cases where the single economic entity principle has been used, challenged and upheld are:

(1) EC Council Regulation No 384/96; even though in art 2.6 of the EC Council regulation the same words exporter or producer under investigation appears, the European Count of Justice upheld the use of the principle of single economic entity to the word exporter/producer; and

(2) Special Import Measures Act ('SIMA'), Canada. In s 15 of the SIMA, the word used is 'exporter' and the Panel also upheld the use of principle of the single economic entity. Reference is made to the case 'In the matter of final determination of dumping regarding certain refined sugar, refined from sugar cane or sugar beets, in granulated, liquid and powdered form, originating in or exported from the United States of America' by the Binational Panel review under the North American Free Trade Agreement ('NAFTA').

[12] I think firstly, it ought to be noted that the concept of a single economic entity is nowhere provided for in the Act It appears to be a concept that the respondent 'imported' from the European cases cited by the respondent. I am of the opinion that the respondent has misdirected itself by applying this concept. The words of the Act are clear and unambiguous. Section 15(1) provides that no anti-dumping duty shall be imposed except in accordance with the Act. Section 15(1) provides; 'No anti-dumping duty shall be imposed except in accordance with this Act'.

[13] Section 16(5) which provides, '.... by the exporter or producer under investigation' clearly only permits the use of the profits by the exporter or producer under investigation. In *Sarawak Shell Bhd & Anor v Menteri Kewangan* [2001] 1 MLJ 602, held that the Minister of Finance was in error for relying on the words of UK tax legislation and disregarding the words of the Malaysian legislation. Similarly here, the respondent was clearly in error. In relying on the European cases that applied the concept of a single economic entity, the respondent disregarded the clear words of our Malaysian legislation. It is misconceived for the respondent to rely s 2(5) of the Act to justify its use of the concept of a single economic entity. Section 2(5) has nothing to do with the concept of a single economic entity. Section 2(5) is part of the interpretation section of the Act. It merely sets out when parties are deemed to be related for the purposes of the Act. Section 2(5) would only be relevant if a particular section of the Act refers to related parties, such as in s 17(2) of the Act. Section 16(5) of the Act is not expressed to extend to and does not make any reference to related parties. Section 16(5) is expressly restricted and confined to only the exporter or producer under investigation. Section 16(5) clearly does not permit the use of the profits of a third party, whether related or not, in substitution of the producer/exporter under investigation. Despite this, the respondent is in effect saying

it is entitled to do so. Short of re-writing the Act and s 16(5) in particular, the respondent cannot do this. The other point to note is this.

[14] If the respondent was of the view that profits could not be properly determined on the basis specified in s 16(5), the respondent is obliged, following the Act, to determine it on the basis set out in s 16(6). Section 16(6) expressly provides that if the amount cannot be determined on the basis specified in s 16(5), the amount is to be determined by one of the three methods set out in s 16(6)(a), (b) and (c). Section 16(6) provides:

> (6) If the amount referred to in subsection (5) cannot be determined on the basis specified in that subsection, the amount may be determined on any of the following basis:
>
> (a) the weighted average of the actual amount incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
>
> (b) the actual amount incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category or products; or
>
> (c) any other reasonable method, provided that the amount for profits so established shall not exceed the profit normally realized by other exporters or producers on the sale of products of the same general category in the domestic market of the country of origin.

[15] The respondent was obliged to apply s 16(6) if it felt that s 16(5) could not be applied. It however did not do so. Instead it chose to re-write s 16(5) to extend it to a third party who is not the producer/exporter under investigation. This is plainly ultra vires its powers under the Act. It also drives a coach through the legislative scheme laid down in ss 16(5) and 16(6).

[16] I think the European cases referred to by the respondent do not assist the respondent. These European cases merely held that it is proper to take the sales prices of a sales subsidiary as the normal value as 'these prices may quite properly be regarded as the prices actually paid or payable in the ordinary course of trade within the meaning of art 2(3)(a) of the anti-dumping regulation. It is obvious that art 2(3)(a) referred to in the European cases is the equivalent to our s 16(1) which provides:

> For the purpose of this act, the normal value shall be the comparable price actually paid or payable in the ordinary course of trade for the like product sold for consumption in the domestic market of the exporting country.

[17] The respondent would, following s 16(1) and the European cases, be entitled to use the sales prices of Mega Kertas in the domestic market as the normal value under s 16(1). The respondent did not however act under s 16(1). It did not use the sales prices of Mega Kertas in the domestic market as the normal value as the respondent itself found that these sales were not in the ordinary course of trade (see para 67, public report of the final determination at exh TK–2 at p 22, encl 3). The European cases are therefore I rule of no assistance to the respondent here.

[18] I also think the use of only the profitable sales of Mega Kertas is misconceived, irrational and unreasonable in the circumstances. What the respondent did here was to selectively choose to use only the profits on profitable sales of Mega Kertas in constructing the normal value. This only made up 13.6% of Mega Kertas' sales. The rest of Mega Kertas' sales (86.38%) that were unprofitable were disregarded by the respondent. If these unprofitable sales were also taken into account, it is not disputed that there would not be a profit but a net loss of approximately 13.6%. There would therefore be no profit to include in the constructed normal value and consequently, dumping would not have been established. Even if the use of profits of a third party can be said to be permitted under s 16(5), the respondent must act reasonably and fairly by taking into account the entire sales of the third party. The respondent cannot selectively pick and choose only the profitable sales in order to arrive at a fictional 'profit' when in fact no profit but a significant loss exists. It is plainly irrational and unreasonable, if not perverse, for the respondent to find that there are profits to be included in the constructed normal value based on a minority of sales when the vast majority and thus the overall sales were at a net loss.

[19] The respondent has, in arriving at its decision to impose anti-dumping duties, wrongly made adjustments to the normal value and export price in a manner that is not authorised by the clear provisions of the Act. The respondent has thus committed errors of law which this court ought to intervene to correct. The relevant provisions of the Act referred to above are plain and clear. The respondent has misdirected itself on the law by going outside the statute in determining the normal value and export price. A taxing statute is to be construed strictly. Nothing is to be read in or implied, Even if it can be said that there is ambiguity in the provisions, it must be construed in favour of the taxpayer. In *Sarawak Shell Bhd & Anor v Menteri Kewangan* [2001] 1 MLJ 602 pp 621–622 state:

> These trite principles of revenue were applied by the Supreme Court in *National Land Finance Co-operative v Director General of Inland Revenue* [1994] 1 MLJ 99 at p 342 Gunn Chit Tuan CJ (Malaya) said:
>
> > Counsel contended that in constructing the said amendment certain principles relating to the interpretation of taxing statutes must be followed. First, there is no room for intendment in tax legislation and the rule of strict construction applies. Unless there are clear words tax cannot be imposed, (per Rowlatt J in *Cape Brandy Syndicate v IRC* 12 TC 358). Another principle is that where the meaning of a statute is in doubt the ambiguity must be construed in favour of the subject. Yet another principle is that an exemption from tax cannot be removed except by sufficiently clear words to achieve that purpose.
>
> There are ample authorities to show that the courts have refused to adopt a construction of a taxing which would impose liability when doubt exists. In Re Micklewait (1844) 11 Exch 452 it was held that a subject was not to be taxed without clear words. I am aware that revenue from taxation is essential to enable Government to administer the country and that the courts should help in the collection of taxes whilst remaining fair to taxpayers. Nevertheless, I should remind myself of the principle of strict interpretation as stated by Rowlatt J in *Cape Brandy Syndicate v IRC*, supra:

> ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used....

It has also been said by the Judicial Committee in *Oriental Bank Corporation v Wright* [1880] 5 AC 842,856:

> That the intention to impose a charge upon a subject must be shown by clear and unambiguous language.'

[20] Dumping is only established if the export price is less wangle normal value. The normal value constructed by the respondent was increased to an amount greater than the export price (thereby establishing dumping) as the respondent erroneously included profits it should not or could not reasonably or rationally have included under the Act:

(a) Firstly, the respondent acted outside the clear provisions of the Act. It included profits in the normal value by using the profits on profitable sales of a third party (Mega Kertas) in contravention of and ultra vires the provisions of s 16(5) of the Act;

(b) Secondly, the respondent acted wholly irrationally and unreasonably. It arrived at this 'profit' by selecting only profitable sales of the third party although they represented only a small portion of the sales of the third party. It ignored the majority of sales that were at a loss and consequently the fact that the overall sales of the third party were at a significant net loss of 13.6%.

[21] On either of these grounds alone, the imposition of anti-dumping duties ought to be quashed. The Countervailing and Anti-Dumping Duties Act 1993 is a taxing statute. It allows the respondent to impose anti-dumping duties in cases where it is established that the export price is less than the normal value. The method of determining this is provided for in the Act. It is settled law that a taxing statute is interpreted strictly without anything read in or implied. It is also settled law that:

(a) where the language of a statute is clear, it must be followed; and

(b) where the language of a statute is clear, only Parliament can re-write it.

For these reasons I hereby grant for an order in terms of prayers (1) and (3) of encl (10).

Order accordingly.

Reported by Sally Kee